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MAR 3 1903
JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 175.

HENRY H. BROCKFINGER, APPELLANT,

vs.

JOHN W. FOSTER, W. S. ROBERTSON, AND A. C. SCHNELL, TRUSTEES OF TOWN-SITE BOARD No. 6, OKLAHOMA TERRITORY, APPELLEES.

REPLY BRIEF FOR APPELLANT.

In reply to some of the propositions suggested by counsel for appellees in their brief and oral argument, I submit, with leave of the court, the following additional suggestions and citation of authorities:

Said counsel strongly insist that this land was donated by Congress to these town-site trustees for the uses and purposes prescribed in the act of May 14, 1890 (26 Stat. 109), and then proceed to argue this proposition as though this particular land had been reserved by Congress from settlement and entry under the Homestead Law. This position is wholly untenable. It was only by reason of the erroneous rulings of the Secretary of the Interior that this particular land was awarded to the town-site claimants and

the patent therefore issued to the town-site trustees; hence said land was at all times subject to appropriation by a qualified homestead claimant until a legal town-site selection had been made, which appellant claims was never done.

This conveyance was not made to these trustees for any charitable use, nor was it in any sense a donation, as the regular purchase price for the land was paid by them and is duly acknowledged in the patent (see appendix to appellant's original brief, pages 39–40).

Great stress is laid by said counsel upon the fact that this conveyance was made to said trustees for certain specific uses, and that they had no authority to dispose of the land in any other way; but as stated in original brief, this in no wise limits or qualifies the fee (see p. 12). In addition to the authorities cited in said former brief on this question, I call special attention to Long *vs.* Moore, 48 S. W. 43, wherein the following language is quoted with approval from the case of Olcott *vs.* Gabert, 86 Tex. 123, 23 S. W. 985, to wit:

> "There are no conditions subsequent expressed, and, although they may be implied, they are not favored in law. It may be that the consideration expressed should be deemed nominal, and that the conveyance should be treated as voluntary, and it is true that a condition will be more readily implied in a deed of that character than in one which rests upon a valuable consideration. Yet the rule is well recognized that the mere declaration of the uses to which the granted premises are to be applied does not ordinarily import a condition. Where the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when, as in this case, the use is for the benefit of a special class of persons or of the public at large. In this case it does not appear that the maintenance of a church upon the lots was a matter specially advantageous to the railroad company who made the grant."

It is worthy of observation that the declared purpose for which the land in controversy was conveyed by the Government was, in no event, to inure to the benefit of the grantor, but was solely for the benefit of the town-site claimants, beneficiaries under the patent. See also on this point, Farnham *vs.* Thompson, 34 Minn. 331, wherein it is held that—

> "in a conveyance of land to a religious corporation the words 'for the purpose of erecting a church thereon only' following the description of the property do not of themselves create a condition subsequent.

And Ryan *vs.* Porter, 61 Tex. 106, wherein it is held that—

> "Courts, either of law or equity, will adopt any reasonable construction consistent with the terms of an instrument that will defeat the springing of an implied condition subsequent in a grant.
>
> "The conveyance to the trustees was not made on a condition subsequent, a failure to comply with which would work a forfeiture of the land.
>
> "The grantor divested himself of title to the property unconditionally, and invested the fee in the trustees for the benefit of the Methodist Church, South, limiting the use of the property to the class of preachers named."

Said counsel also contend that the patent issued to said trustees under the authority of said act—

> "was merely the conveyance, by authority of Congress, of the title to the land from one set of officers of the United States to another for the purposes of administrative convenience, and that the real title was just as fully in the United States and its officers after such patent was executed and delivered as it was while the land remained strictly a part of the public domain" (brief, p. 9).

In reply to this contention, I submit that the title to this land, so long as it remained a part of the public domain, was vested exclusively in the United States and no part of

it in any officer or set of officers thereof. Hence, the effect of such conveyance could not possibly have been merely to transfer the title from one set of Government officers to another. In fact, the Government has never yet held title to public land as a tenant in common with any of its officers or agents, and has not been in the habit of selling such land and issuing patents therefor to such officers or agents without intending thereby to divest itself of title to the land so conveyed; and, if it be conceded that the legal title to the land in controversy had passed from the Government itself when this action was brought, then it matters not in what set of officers or agents such title vested, as they could properly be sued by one having prior and paramount equities in the land. United States *vs.* Lee, 106 U. S. 196. Otherwise the title to public land might be wrongfully passed from the United States and vested perpetually in Government officers, and thereby forever preclude the party to whom the land should rightfully have been patented from invoking the powers of a court of equity to procure relief from the wrongful action of the Executive Department in so conveying said land to such officers. On this proposition counsel for appellees say:

> "By the act of Congress machinery was provided whereby the United States could execute such a conveyance to its officers, the town-site trustees, for certain purposes and those purposes only, and this, except for those purposes, leaves not only the title but the equitable interest in the lands combined in the United States and not in the trustees, so as to create an indefeasible title and private right in the latter. This doctrine was undoubtedly that contended for by the United States attorney in the court below, and entertained and adopted by the court below in holding the demurrer good" (pp. 9–10).

As already shown, this position of counsel is not maintainable because, by the terms of the patent, a conveyance in fee is made to said trustees, as there are no words of

limitation nor any condition subsequent contained therein. As stated in appellant's original brief (Rec., p. 11), the supervisory power vested by said act of May 14, 1890, in the Secretary of the Interior could as well have been vested by Congress in some other person, body, or tribunal, as was done in previous town-site legislation (see section 2387, R. S., 5 L. D. 267). It could as consistently be contended that, because under the said former town-site Acts of Congress a supervisory power was vested in "the legislative authority of the State or Territory in which the same may be situated," the title to the land conveyed by patent to the corporate authorities of such town (if incorporated) or the judge of the county court for the county in which the town is situated, if not incorporated, did not fully pass from the United States.

It was also contended by said counsel, in the oral argument, that under no circumstances could appellant be entitled to the relief prayed for in his complaint, which said prayer is, in substance, that the town-site trustees be decreed to hold the land as trustees for the use and benefit of appellant, and ordered to make a proper conveyance to him therefor (Rec. p. 15).

In reply to this contention I submit that, if appellant is entitled to any relief whatever, it is that prayed for in his bill, as this is the only way for a person having a superior equity in public land to enforce same after a patent has been wrongfully issued to another party. See the recent case of James *vs.* Germania Iron Co., 107 Federal, 597, and cases therein cited. Of course it is not essential and hardly expected that the trustees would make the conveyance in compliance with a decree as prayed for by appellant, but the decree itself would operate to effectively invest him with both the legal and equitable title to the land. Steel's Lessees *vs.* Spencer, 1 Pet. 558.

In addition to the land decisions cited in appellant's original brief, at page 38, to the effect that the settlement

rights of one occupying land covered by a homestead entry as a homestead claimant attach *eo instanti* upon the removal of such former entry. See Moss *vs.* Dowman, 176 U. S. 413. However, as counsel for appellees have declined to discuss in their brief any proposition going to the merits of this controversy, and, as the court below did not determine or discuss any such proposition, it is surely unnecessary to consume further time in elaborating said propositions on behalf of appellant.

Respectfully submitted,

JAMES R. KEATON,
For Appellant.

NOTE.—There are several typographical and other errors in the printing of appellant's original brief, some which, without correction, will doubtless tend to confuse the court; hence the following explanation is offered:

1. Commencing with the word "Also" in the 11th line from the top of page 6, the remainder of said paragraph should read as follows:

> "Also, that he made a tender to said trustees prior to the commencement of this action of a sufficient amount to fully reimburse them for the sums expended in procuring patent for said tract."

2. The word "claiming" in the 1st line from top of page 10 should have been "which."

3. Commencing with the word "In" in the 15th line from the bottom of page 20, the following two sentences should read thus:

> "In defending themselves they are defending all the beneficiaries, and a judgment in favor of the trustees is equally a judgment in favor of the *cestuis que trust*. The latter have no diverse or peculiar interest to be protected."

5. On page 34 of said brief the citation of page "295" in 5 L. D. should have been page 265.

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